

What Market, What Society, What Union?

Martinho Lucas Pires · Francisco Pereira Coutinho
Editors

What Market, What Society, What Union?

The Treaty of Amsterdam and the European
Thought of Francisco Lucas Pires



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Foreword

What Francisco Lucas Pires Can Teach Europe Today

Francisco Lucas Pires was a true European in the most genuine and valuable sense. He was a European in the footsteps of Ortega y Gasset or Georg Steiner. He was a uniquely creative and cultivated intellectual whose thinking was inherently European. Shaped by European ideas and a perspective on reality that was embedded in Europe. He also followed the great European intellectual tradition where knowledge and curiosity know no borders, either of style, scientific disciplines or activities. He was comfortable as a politician as an academic or as an essayist as he was uncomfortable in all of them... His mind was restless and guided only by intellectual curiosity and the need to understand the world around him in a productive way.

That is visible in his legal writings, such as this book, now published in English with a remarkable set of comments that make clear how much of what Lucas Pires thought is still pertinent today and of great value to understand and shape the current challenges faced by the European Union.

Francisco Lucas Pires was a visionary. Perhaps the first to use the expression European Constitutional Law and one of the first to understand that the development of European integration would require a new understanding of democracy and social justice beyond the state. He did not argue against the state, but argued that the future of governance in Europe would also require the development of a European political community founded on democracy and justice.

Many have argued in favour of political integration in Europe, but if Francisco Lucas Pires were here he would tell us that we are already politically integrated, such is the degree of interdependence between our policies. What we need do is to discuss how to legitimate such political integration with the absence of European politics being the biggest of our democratic challenges.

This remains the key issue today, as what followed the recent European Parliament elections made obvious. We ask citizens to be part of a European polity but then allow such polity to be dominated by national politics. It is also clear that

overcoming the current crisis entails the enlargement of the fiscal and political responsibilities of the European institutions. This, in turn, requires the emergence of a European political space so as to give to the Union the legitimacy, authority and efficacy necessary for the tasks that is acquiring and will need to acquire. At the centre of this political space must be the citizen, the citizen of both the States and the European Union. As argued by Francisco Lucas Pires, by putting the citizen first we can overcome a zero-sum approach to the relation between the European Union and the Member States. It is possible for State and European political communities to co-exist, precisely because of the primacy of citizenship at the core of any constitutional project.

In fact, for Lucas Pires, national and European constitutional forms and ambitions were different but had to be part of the same project of constitutionalism. They would mutually reinforce and correct each other. This was not absent of problems and challenges, but it was required to achieve the goals of constitutionalism in an increasingly interdependent world. This was the challenge for constitutional scholars and European politicians alike. To build an open model of European integration that would embody both national and European constitutionalism in a broader open constitutional project for the future. As he stated it: “A model of open unity, by definition indefinable, is the only viable and desirable one. But it needs to be inspired by the basic ideas of subsidiarity, solidarity and openness. This is the Europe we can build democratically and in peace”.

It was so when he wrote it. It is even more so today.

Miguel Poiares Maduro
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Preface

Twenty-two years have passed since the signing of the Treaty of Amsterdam. At the time, this Treaty was understood as a moment for amending and strengthening some of the bold options taken previously in the Treaty of Maastricht,¹ particularly regarding the social and political dimension of the Union’s constitutional order. Important developments were made in Amsterdam regarding mobility and external relations, with the formal introduction of the Schengen agreements into the EU’s *acquis* and the granting of legislative power to EU institutions in the area of asylum policies. The capacity to coordinate national employment policies and the possibility of taking some measures in the area of social policy were added to the Union’s legal framework. Institutional and procedural reforms were also implemented, such as the spread of the co-decision procedure and qualified majority voting to the majority of policy areas, and the introduction of the mechanism of enhanced cooperation. Constitutional “teeth” were added with Article 6 of the Treaty of the European Union for suspending a Member State’s rights under the Treaties for breaching the “ideals” of the EU: no less than democracy, liberty and the rule of law.

Despite the improvements, the perception was that Amsterdam did not amount to the change that was necessary, ending up, as a typical Portuguese saying goes, to “taste very little”.² The passing of time did not help: shortly after Amsterdam came the Treaty of Nice, followed by a period of an apparent *pouvoir constituant* that ended up in the Treaty of Lisbon, where many of the issues and controversies arising from Maastricht were set (in a good or bad way, it remains to be seen). It therefore seems easy to overlook Amsterdam as just a moment for supranational

¹Weiler J. H. H. (1999) *The Constitution of Europe: ‘Do the New Clothes Have an Emperor?’ and Other Essays on European Integration*, Cambridge University Press.

²On the Amsterdam Treaty and its achievements at the time, see Pernice I (1999) *Multilevel Constitutionalism and the Treaty of Amsterdam: European Constitution-making Revisited?*, *Common Market Law Review* 36, 703–750. and Moravcsik A and Nicolaidis K (1999) *Explaining the Treaty of Amsterdam: Interests, Influence, Institutions*, *Journal of Common Market Studies* Vol. 37, 59–85. For a current opinion, see Craig P (2017) *Development of the EU*, in Barnard C and Peers S (eds) *European Union Law*, Oxford.

“housekeeping”, to fix certain institutional and normative aspects and lose track of its significance between the two constitutional enterprises of Maastricht and Lisbon.

However, a closer look at Amsterdam’s main innovations from the current point of view—in an era where the EU’s political credentials are more at stake than before, as demonstrated by the subjects and aftermath of the several post-Lisbon crises (refugees, Euro, rule of law, Brexit...)—shows how this often unheralded Treaty marked a significant step towards a more profound, humanistic stance of European Integration. Building upon the Maastricht steps, it developed a more protective and broader space for the individual in Europe, an individual that stopped being limited to the consumer but included now also the foreigner, the refugee, the worker, the pensioner—the person. More than a mere constitutional re-tuning, it rather confirmed and set out a clear constitutional path to Europe, despite all the shortcomings. The impact of these measures is being widely felt today in Europe, as it can be seen, for example, with the migration crisis and the tensions surrounding application of the Schengen rules, or the enforcement of Article 6 against certain Member States for failure to comply with the respect for the rule of law, or still with the development of differentiation in policy areas such as the EMU and the cuts on social policies coming from the application of austerity policies due to EU macroeconomic supervision rules. The constitutional delivery of Amsterdam may have been modest, but its “promise” was not.

In this sense, a revision of Amsterdam is also, necessarily, a reflection on the current constitutional status of the EU, and an important backdrop in which to assess the merits and pitfalls of such a path, and to consider how to better build upon its achievements to guarantee the fulfilment of its “promise”.

If there was someone who would revel in participating, discussing and debating about constitutional moments, constitutional challenges and promises, that person would be Francisco Lucas Pires, my father. Lucas Pires was a Portuguese professor of constitutional law and EU law, and also a politician. As a scholar, Lucas Pires, who graduated and received his Ph.D. in constitutional law from Coimbra Law School (where he was an associated professor), researched and lectured in public law and political science. He started his research in the field of constitutional theory, the subject of both his post-graduate thesis (“*O Problema da Constituição*”) and Ph.D. dissertation (“*Teoria da Constituição de 1976: a Transição Dualista*”), before moving his analytical and critical insights to the legal and political nature of the EU. He published extensively in these fields, becoming one of the most original and known constitutionalists in Portugal. His interventions and books on European Integration—such as “*Introdução ao Direito Constitucional Europeu*” (“Introduction to European Constitutional” Law) published in 1997—also made him one of the most known and respected Portuguese thinkers of European law and politics.

Lucas Pires’ interest on constitutional law was not only theoretical, but also practical. As a politician, Lucas Pires served as a Member of the Portuguese Parliament, from 1976 to 1985, where he was an active participant in the constitutional reform of 1982. He was Minister of Culture between 1982 and 1983 and leader of the Christian Democratic Party in 1983 to 1985. In 1987, he was elected to

the European Parliament, where he served until his untimely death, in 1998. In Brussels, he was no less active than in Lisbon, participating in the drafting of the Maastricht and Amsterdam treaties, coordinating the European People's Party Parliamentary Group and being twice elected vice-president of the European Parliament (in 1987 and 1998).

I will leave more details about his political life and biography to the short note prepared by Edmundo Alves. I will also leave the explanation of the importance and impact and thought of his works to the preface generously prepared by Miguel Poiares Maduro. I would just like to say that Lucas Pires was a cosmopolitan scholar and an active political participant. He had in him the sagacity and creativity of an academic mind, mixed with the desire and fight of a parliamentarian, willing to argue and discuss, with a great degree of knowledge and depth, his ideas and ideals. He was also a strong believer in the European project, an enthusiastic parliamentarian, never shying away from a political debate and participation. He was a civic, public actor *in totem*, willing to defend his ideas for the common good, both in universities and in assemblies. He lived, in the words of Helmut Kohl, "in exemplary fashion, the ideal of comprehension between nations".³

His untimely disappearance came 20 years ago, but his readings still show a remarkable and provocative actuality, providing important reflections and many new ways to look at the current political and constitutional challenges that the EU now faces. His swan song was the book "*Amesterdão: do Mercado à Sociedade Civil Europeia*" ("Amsterdam: from the Market to the European Civil Society") published posthumously in 1999. In it, Lucas Pires discusses the drafting and discussions of Amsterdam, and its wider implications, introducing the Treaty and the history of its negotiations with the nous and authority of an active participant in the process, as well as with the critical eye of a distanced analyst.

The result is a profound and original reflection, in the form of a legal-political essay, of an important moment in European Integration history, that had a crucial impact in the time we are now living in. The book looks at the most important issues that Europe is facing today, such as the power of the Union as a community of values and citizens, the importance of social policy, the governance questions arising from institutional and normative changes, the relationship between Member States, the new competences on asylum and Schengen, and of the role of the euro as a catalyst for European Integration.

Francisco Pereira Coutinho and my family devised under this scenario, the perfect homage to the person that the American constitutionalist Bruce Ackerman labelled an "original thinker": a conference on the past, present and future of the EU based on the comment of Lucas Pires' last book. This was possible thanks to the translation of Lucas Pires' book *Amsterdam: from the Market to the European Civil Society* to English, generously supported by the European People's Party, and commented by young European academics that never had contacted with the thought of Lucas Pires before. In this way, it would be possible to offer new and

³Citation on the back page of the Portuguese edition of the book, translated by the author.

enriching thoughts and considerations on political and legal challenges of our times and, at the same time, to honour Lucas Pires' legacy. The conference, titled "What market, what society, what Union? The Treaty of Amsterdam and the European thought of Francisco Lucas Pires", took place on 4 October 2018.

This book is the result of that conference. The first part of the book is composed by the translation of *Amsterdam: from the Market to the European Civil Society* to English, made by Luís Tirapicos Nunes, with a revision by Richard Rodgers. The translators successfully managed to adapt the Portuguese text to the English language while maintaining all its depth of content and literary "punch". The second part of the book consists of six short essays written by six EU Law professors, from different European universities, discussing and engaging with a topic of Lucas Pires' manuscript. In the first essay, "Constitutionalism, Federalism and Constitutional Reforms in Francisco Lucas Pires' Thought", Giuseppe Martinico, associate professor of comparative public law at the Scuola Superiore Sant'Anna, Pisa, focuses on the analysis of three points: notions of constitutional terminology, importance of constitutional reforms for the creation of a "federal-like" EU and the importance of the social question at supranational level. In the second essay, "The EU Democratic Governance in Francisco Lucas Pires' Thought and Its Enduring Topicality", Cristina Fasone, assistant professor of comparative public law at LUISS School of Government, Rome, reflects on EU governance and its connection with the many dimensions (representative, participatory) of democracy, and the latter's importance as a more civilizing force on the market. The third essay, "European civil society, rights and non-Europeans: thoughts upon reading Amsterdam—From the Market to the European Society by Francisco Lucas Pires" comes from Samo Bardutzky, assistant professor and head of the constitutional law department of the University of Ljubljana Law School, Ljubljana. In this essay, the author discusses the current status of European citizenship and tensions within European civil society regarding the refugee situation, addressing the importance of the role of rights and of the notion of public sphere. The fourth essay comes from Diane Fromage, assistant professor of European law at Maastricht University, Maastricht, and is entitled "Francisco Lucas Pires' views on the Economic and Monetary Union and the Single Currency: An Assessment Twenty Years Later". Fromage engages with Lucas Pires' view on the Economic and Monetary Union and the euro, critically assessing the evolution of the single currency in the years that followed the publication of the manuscript. Paschalis Paschalidis, former référendaire at the Court of Justice of the European Union and current senior associate at Shearman Stearling, reflects on the significance of asylum policy in the EU and its critical development, in the fifth essay "Asylum policy: a measure of the EU's fidelity to its history and values". Finally, in the sixth and final essay "A Sisyphean struggle: Portugal's referendum on European integration", Francisco Pereira Coutinho discusses the complexities of the relationship of Lucas Pires' country of birth with European integration.

The best homage that this book could provide to the memory of Lucas Pires can be summoned in three points: first, that it serves as the first English translation of his works to be published for a broad audience of scholars, politicians and alike;

second, that it provides a platform for discussion of the past and present of European Integration by different original voices; and third and final, that it can help in the reflection and subsequent debates and actions for the improvement of EU integration, particularly given the challenges ahead. As Lucas Pires stated at the beginning of his manuscript,

Indeed, it is actually at moments when one is at a crossroads and the ambiguity is at its greatest, or when, as now, the result seems more dispersedly reactive than coherently propositional, that the integrating contribution of the law can offer a perspective that is simultaneously more consistent and useful than that provided by fickle conjunctural political purposes.

Hopefully, this book will provide such a contribution.

On behalf of Lucas Pires' family, I would like to make some acknowledgements. The first and principal thank goes to Francisco Pereira Coutinho, a true academic and friend who actively proposed and helped develop this book. The second goes to Frank Bakker and Asser Press for accepting to publish this book and for all the patience with the process. Thank you to everyone at Nova Law School who helped organize the conference and this book, with a special thanks, regarding the latter, due to João Azevedo. Thank you to Luís Tirapicos Nunes for the translation of Lucas Pires' manuscript to English and for Richard Rodgers for the revision work for the manuscript to be published in this book. Thank you to Rui Moura Ramos, Nuno Piçarra and Paulo Rangel for their testimonies and statements in the conference at Nova Law School. Thank you to Miguel Poiares Maduro for continuing to honour the legacy of Lucas Pires. Thank you to Henrique Mota and Principia for all the friendship, help and support with the publication of the manuscript in English. Thank you to Miguel Seabra, for just about everything in what relates to keep the memory of Lucas Pires alive. A special thanks to Edmundo Alves for the biographical note. Finally, a great thanks to Cristina, Diane, Giuseppe, Samo and Paschalis for their time and work in reading and critically reflecting on Lucas Pires' work and engaging with his ideas. It was what he liked the most: to discuss, to engage, to act upon the discussion of ideas and, if not change, at least shake the paradigm.

This book would not have been possible without the support of the EPP, of which the family of Lucas Pires in particular thanks the person of Martin Kamp, Secretary-General of the Party, who generously supported the translation of Lucas Pires' manuscript into English. The help of the European Parliament's representation in Portugal in supporting the conference in Lisbon is to be acknowledged also, in the person of Pedro Valente. I would also like to thank, on behalf of the family of Lucas Pires, Jurisnova for making it possible that this oeuvre can see the light of day.

Lisbon, Portugal

Martinho Lucas Pires

Biography of Francisco António Lucas Pires

Francisco António Lucas Pires was born in Coimbra in October 1944.

After finishing his secondary education at Liceu D. João III, Lucas Pires pursued studies at University of Coimbra Law School. Specializing in constitutional studies, obtained a post-graduate degree in Political and Economic Sciences in 1969 and a Ph.D. with the Dissertation *Teoria da Constituição de 1976. A Transição Dualista*, both from University of Coimbra.

In 1967, Lucas Pires started a thirty-year-long teaching career, first at his *alma mater*, as an assistant lecturer, and later at Catholic University of Portugal and Autónoma University of Lisbon, as headmaster of its law department.

As a nationalist right militant in his youth, Lucas Pires took part in movements such as Movimento Jovem Portugal and Cooperativa Livreira Cidadela. After the coup of 25 April 1974, he joined the Christian Democratic Party Centro Democrático Social (CDS), being one of its vice-presidents between 1978 and 1983 and president between 1983 and 1985. As president of CDS, he was elected vice-president of the European Union of Christian Democrats (UECD). Member of the Portuguese parliament—*Assembleia da República*—between 1976 and 1986, he was nominated, in that capacity, to the Council of Europe Parliamentary Assembly.

At the end of the 1970s, Lucas Pires successfully coordinated the negotiations between the centre-right parties in order to form a coalition, *Aliança Democrática* (AD) that would lead three successive governments between 1979 and 1983, taking part in the coalition's third government, the VIII Constitutional Government (1981–1983), as Culture and Scientific Coordination Minister.

In 1987, he was elected member of the European Parliament (EP), as CDS candidate, taking seat at the European People's Party (EPP) parliamentary group. Re-elected in 1989, Lucas Pires detached himself from CDS in 1991, mainly as a consequence of the growing influence of its euroskeptical wing, which would soon take over the party's leadership. In 1994, he was elected for a third term in the EP, this time running in Partido Social Democrata's (PSD) list. Despite PSD being at the time a member of European Liberal Democrat and Reform Party (ELDR), Lucas Pires remained, in his own right, as a popular European MEP, thanks to the

efforts of Aníbal Cavaco Silva, president of the social-democrats and Wilfried Martens, then chairman of the EPP.

At the EP, Lucas Pires was a very active member, taking part in numerous parliamentary commissions, being its first Portuguese vice-president, between 1986–1987, and again in 1998, when he was also elected vice-chair of the Committee of Institutional Affairs. He was a member of the Committee on the Verification of Credentials, the Committee on Budgets, the Committee on Regional Policy and Regional Planning and the Committee on Legal Affairs and Citizen's Rights, among others.

Lucas Pires was also a member from the European Parliament to the Joint Assembly of the Agreement between the African, Caribbean and Pacific States and the European Economic Community (ACP-EEC), the Delegation for relations with the countries of South Asia and the South Asia Association for Regional Cooperation (SAARC) and the Delegation for relations with Estonia.

As an EPP affiliate, Lucas Pires was spokesman and coordinator of the party's parliamentary group and member of the party's think-tank *Nostradamus*.

His prominent career as MEP and professor came to an abrupt end with his premature demise at the age of 53, in May 1998.

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